

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

KAREN VALENTINE, as Executrix of)
William Valentine, deceased, and in her)
own right, and as parent and guardian of her)
minor son, TYLER VALENTINE,)

Plaintiff,)

v.)

C.A. 02C-12-244 PLA

MICHAEL MARK, M.D.,)

Defendant.)

Submitted: October 15, 2004
Decided: October 20, 2004

UPON DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
GRANTED

ORDER

Michael D. Carr, Esquire, Wilmington, Delaware, Attorney for Plaintiff

Richard Galperin, Esquire, Morris, James, Hitchens & Williams, LLP,
Wilmington, DE, Attorney for Defendant

ABLEMAN, JUDGE

Upon consideration, Defendant's motion for summary judgment, improperly titled Defendant's Motion To Dismiss, must be **GRANTED**. It appears to the Court that:

1. This is a medical negligence case in which Plaintiff Karen Valentine has alleged that Defendant Michael Mark, M.D. failed to properly diagnose her husband's ("Decedent") brain tumor for a two month period. Valentine believes that Dr. Mark's misdiagnosis that a stroke had caused Decedent's condition, as well as his failure to inform Decedent that brain cancer was a possible alternative cause of the illness, breached the applicable standard of medical care, and led to a measurable decline in Decedent's life expectancy. Valentine has thus filed a survivorship action on behalf of Decedent, and a wrongful death action for herself and her minor son.

2. The relevant facts are easily summarized and not in dispute. Decedent suffered a series of seizures in January 2001, for which he sought care from Dr. Mark. Dr. Mark sent Decedent to a radiologist, who performed a CAT scan. The radiologist interpreted the imaging as being indicative of a stroke. Dr. Mark agreed, and prescribed a regimen of care consistent with that opinion.

Dr. Mark recognized that there was some possibility that his diagnosis was wrong and that Decedent may actually have had a brain tumor. Dr. Mark chose not to inform Decedent and Valentine of that possibility, for several reasons. First, Dr.

Mark believed the likelihood of cancer was small, and he did not want to alarm Decedent. Second, Dr. Mark knew that the only way to test for the type of brain tumor at issue was to perform a surgical biopsy, i.e. extract a portion of Decedent's brain for testing. Finally, Dr. Mark also knew that if a tumor had caused Decedent's symptoms, that tumor would be quickly and inevitably fatal. Dr. Mark therefore believed that it would be compassionate to withhold this differential diagnosis from the Valentines, and specifically decided to do so to avoid unnecessary alarm.

In March 2001, Decedent suffered a second series of seizures, for which he sought care at a different hospital. The hospital diagnosed Decedent's condition as a glioblastoma multiform, a malignant, rapidly growing, and incurable tumor. The hospital's diagnosis was especially grim because the tumor appeared in the frontal lobe area of Decedent's brain. This meant that it could not be removed, a difficult and often futile task regardless of location, without significantly impairing the brain's executive functions: language skills, cognition, memory, and decision-making.

The hospital referred Decedent back to Dr. Mark, who adhered to his original diagnosis. The Valentines believed the hospital, rather than Dr. Mark, and sought out other neurological care for brain cancer. This alternative medical

provider confirmed the tumor, but was unable to do anything for Decedent, who died in August 2001.

3. In preparation for this litigation, the plaintiff engaged a medical expert, Stephen S. Kamin, M.D. Dr. Kamin is responsible for the neurological residency program at New Jersey Medical School, and also actively practices neurology. Dr. Kamin was deposed on September 1, 2004. The deposition prompted this motion to dismiss, which is more properly termed a motion for summary judgment since it based upon factual matters outside of the complaint.

Dr. Kamin is of the opinion that Dr. Mark breached his duty of care to the Valentines by failing to disagree with the radiologist's interpretation of the first CAT scan, and thus failing to diagnose the tumor. Significantly, however, Dr. Kamin does not believe that this breach caused any material change in Decedent's life expectancy. A few excerpts of his deposition are particularly relevant:

Defense Counsel: Are you going to be giving an opinion in this case as to the effect, if any, on the fact ... that this GBM [tumor] wasn't diagnosed until March, when you feel it should have been diagnosed in January?

Dr. Kamin: I will not be giving a specific opinion on whether there was an effect on the outcome.¹

Defense Counsel: And just to finish with where I began, to make sure you are not going to be giving testimony as to what the ultimate effect that failure to diagnose and treat in January had on Mr. Valentine?

Dr. Kamin: Yes. I cannot say to a reasonable degree of medical certainty, or probability, that it made a difference.²

¹ Dep. of Stephen S. Kamin, M.D., at 14, *hereinafter* "Kamin at _."

² Kamin at 40.

Plaintiff's Counsel: Assuming that William Valentine was representative of that study, are you able to say, based on the studies, had, in January, he been diagnosed and properly an recommend[ed] promptly to radiation and chemotherapy does that put him in an average life expectancy of 18 months?

Dr. Kamin: Probably not... I agree that it probably was not resectable [i.e., surgically treatable], even incompletely.³

4. Summary judgment is proper when, considering all the evidence in a light most favorable to the non-moving party, there is no genuine issue of material fact that would require a trial.⁴ Summary judgment differs from a dismissal in that the former is a measure of the evidence presented, while the later is usually a measure of the legal sufficiency of a pleading. Since Defendant's motion depends upon Dr. Kamin's deposition, it is properly considered as a summary judgment motion, not a motion to dismiss.

18 Del. C. § 6853 reads, in relevant part,

No liability shall be based upon asserted negligence unless expert medical testimony is presented as to the alleged deviation from the applicable standard of care in the specific circumstances of the case and as to the causation of the alleged personal injury or death...

The quoted excerpts from the deposition of Dr. Kamin -- Plaintiff's only expert witness -- indicate that he is unwilling to testify to causation in this case. The plaintiff therefore cannot establish causation in the manner required by the statute; that is, the plaintiff cannot prove that the two months in which Decedent labored under a misdiagnosis made any difference at all in his probable life

³ Kamin at 44.

⁴ *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

expectancy. Without causation, no negligence claim can succeed. Summary judgment is therefore appropriate.

5. Plaintiff's counsel has attempted to repair his failure to establish causation with a somewhat inventive argument, claiming that Dr. Mark's failure to advise Decedent of alternative possible causes of his symptoms deprived Decedent of the right to seek other opinions. This breach, says the plaintiff, meant that Decedent did not grant informed consent to the stroke treatment, or to the lack of brain cancer treatment. Plaintiff also characterizes Dr. Mark's decision to withhold the differential diagnosis as willful, wanton, and malicious.

This argument lacks merit. First, the evidence presented does not at all support the plaintiff's characterization of Dr. Mark's actions as willful or sinister in any respect. Plaintiff offers no reason why Dr. Mark would have maliciously withheld a proper diagnosis from Decedent in order to force him into an incorrect treatment regime. The evidence does support a finding that Dr. Mark, agreeing with other experts, thought that a tumor was unlikely, and made a professional decision that the negative effects of offering that diagnosis, i.e. alarm, a painful brain biopsy, and foreknowledge of inevitable death, outweighed the minimal gains of offering it. Dr. Kamin testified that decisions of when and how to tell

patients that they may have a tumor is “a matter of style.”⁵ While Dr. Mark’s decision may have been ultimately incorrect, it certainly was not malicious.

More importantly, an informed consent action still requires expert testimony as to causation. The Informed Consent Statute, 18 Del. C. § 6852, is found under the “Medical Negligence” chapter of the Delaware Insurance Code. It also specifically references informed consent as a subset of medical negligence, saying, “No recovery of damages based upon a lack of informed consent shall be allowed in any action for medical negligence unless” certain conditions are met. Section 6853 makes it abundantly clear that, barring certain grotesque exceptions, only expert testimony can prove the essential element of causation. Section 6852 cannot therefore be used as a backdoor around the requirement that causation in medical negligence cases be supported by expert testimony.

6. For all the foregoing reasons, Defendants’ Motion for Summary Judgment is hereby **GRANTED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Michael D. Carr, Esquire
Richard Galperin, Esquire

⁵ Kamin at 43.